Civil Resolution Tribunal

Date Issued: April 8, 2019

File: SC-2018-007278

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *NGUYEN v. DUANE SHEARER, (dba OUTSIDE THE BOX HORTICULTURE SERVICE)*, 2019 BCCRT 437

B E T W E E N :

DICK NGUYEN

APPLICANT

A N D :

DUANE SHEARER (Doing Business As OUTSIDE THE BOX HORTICULTURE SERVICE)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. The applicant Dick Nguyen says he hired the respondent Duane Shearer, doing business as Outside the Box Horticulture Service, to complete irrigation and turf installation in his backyard. Although the applicant says he paid 90% of the irrigation

budget, the respondent never completed the job. The applicant claims $400 for "backing out last minute on my turf install agreement resulting in me having to manage and installing the turf on my own" and $1,500 as a refund for the incomplete work on the irrigation system.

2. The respondent disagrees. He says he tried to complete the job, but the applicant had changed the access to the backyard, making it impractical to complete the work. The respondent says it did not charge the applicant for turf. The respondent says the irrigation was placed where the applicant wanted it, and the applicant was only charged for labour that was provided. The respondent asks that the dispute be dismissed.

3. The applicant is self-represented. Duane Shearer, owner of Outside the Box Horticulture Service, represents the respondent.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to a "he said, he said" scenario with both sides calling into question the credibility of the other. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me.

6. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas* v. *Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I decided to hear this dispute through written submissions.

7. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUE

9. The issue in this dispute is whether the respondent must pay the $1,900 claimed by the applicant.

EVIDENCE AND ANALYSIS

10. This is a civil claim in which the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence and submissions but refer to them here only as necessary to explain my decision.

11. The applicant says he hired the respondent to install an underground irrigation system for his front and backyard, and new turf for his backyard.

12. On September 25, 2017, the respondent provided the applicant with a quote for $4,275 plus GST, for the following:

    a. 6 yards of top soil for turf $180.00

    b. Delivery of soil $150

    c. 1020 square feet of turf $510

    d. Irrigation “install 3 zones” $2,450

    e. Labour (8 hours at $95 per hour) $760

    f. Prune pear tree $150

    g. Remove Chinese elm and apply poison $75

13. The quote also says “Ideas for block wall in rear: Climbing hydrangea and clematis you will need to leave a 1 to 1.5 ft bed” and “I will quote front when you are ready.”

14. The irrigation portion of the quote was $2,450. Contrary to the respondent’s submission that the quote was a “contract” to install four zones of irrigation, I find that only three zones were quoted. Four zones would be more expensive to install.

15. The respondent says, and I accept, that starting in October 2017, its staff dug trenches and installed lines, heads, manifolds and a dual check valve at the applicant’s property.

16. The respondent says he purchased supplies for $1,283.20 for the irrigation work. He estimates it took 8.6-person hours to grade the land ($817 worth of labour) and complete irrigation to this point. I prefer the respondent’s evidence on this point, based on all of the evidence but in particular the applicant’s reference to emails he says he had with the respondent in fall 2017, which he did not file in evidence.

17. I note the applicant’s evidence that the sprinkler system was initially missing the programmer/timer and none of the wires were hooked up to the valves or timer, but that the respondent then “installed the timer” in the fall.

18. At that stage, the respondent says water had yet to be connected to the house, so he could not check the irrigation lines.

19. On May 22, 2018, the respondent's employee, K, emailed the applicant saying that they had sent a slinger truck, to look at the applicant's yard the week before, and that there was "…no way to access the rear yard." The email also says that the respondent would have a crew on site Wednesday afternoon to fix irrigation problems and then Thursday afternoon to start moving soil and preparing for turf. The email ends saying "If all goes well turf by friday or tuesday the following week. Sorry for the delays." (quote reproduced as written).

20. While I understand the applicant's frustration that this email suggested that the job could be completed, I find that it was sent by K prior to Mr. Shearer evaluating the changed access issues himself.

21. On May 23, 2018, Mr. Shearer visited the site himself and repaired the manifold. He says he reviewed the site and found a concrete wall with an 8-10 foot drop to the yard, where there had been a rolling hill to access the backyard previously. The applicant does not contest, and I accept, this evidence. The respondent decided the access made completing the job impractical and unsafe.

22. On May 23, 2018, the respondent emailed the applicant saying that [sic] " I was there today and repaired the manifold ,after looking at the labour costs and time frame, we are sorry to inform you that we cannot do this job". By then, the also respondent knew that the slinger truck could not be used, meaning any dirt would have to be moved manually.

23. The applicant filed a photograph of his backyard after he installed turf himself. The applicant says he was able to install the turf using a wheel barrow.

24. The applicant says the irrigation system installation was left incomplete, as was the turf installation.

25. On November 8, 2018, the respondent invoiced the applicant $2,205 for “Irrigation – install 4 zones” with a note “this is less than 90% of irrigation quote the rest to be billed upon completion.” It is undisputed, and I find, that the applicant paid this invoice.

26. In the spring, the respondent went back to the applicant’s rear yard and found it could no longer be accessed easily without using the neighbour’s yard. He consulted with a road products company to see if they could sling the soil required into the rear yard. When they declined, the respondent notified the applicant that he did not have the tools to complete the job, via the May 23, 2018 email.

27. The respondent says the applicant was only charged for the work completed to that date.

28. The applicant argues that the respondent breached their agreement by abandoning promised work on the irrigation system and turf installation. The applicant’s submissions suggest that he expected the job completed for the quoted cost, despite the changes to access to the backyard.

29. Turning to the irrigation system, there is insufficient evidence that the irrigation system was installed in any way deficiently, except that both parties agree it was not finished. Having said that, I find that the $2,205 in work that was paid for by the applicant was completed, based on the respondent’s description and the photographs of the site. I also say this because I find the $2,205 was described as “less than 90%” of the irrigation quote, and not 90% of the quote as the applicant has argued. I accepted the $817 hours of labour to that point, before tax, and $1,283.20 for the irrigation supplies, so I find the applicant received full value for the $2,205 he paid. As I noted above, the initial quote was to install three lines, but the installation was for four lines, which would have been more expensive.

30. The fall 2018 agreement to complete the irrigation and turf for the applicant was made based on the conditions at the work site at the time. I find that the applicant changed the access to his rear yard, because his photographs show the backyard,

with a retaining wall. I find that it was an implied term of the agreement to complete the irrigation and turf work with the access to the yard as it was in fall 2018. I find that the applicant breached this condition. I find that the respondent was therefore entitled not to complete the irrigation or turf work.

31. While I accept that the applicant was able to complete the turf installation in the rear yard on his own with a wheelbarrow, this does not mean that the respondent should have had to do so. It was reasonable for the respondent to decide that, given the problems posed with changed access to the backyard, he was no longer prepared to complete the work as quoted.

32. Even if I had decided that the respondent was liable in breach of contract, the applicant has not proven his damages. He quantified the cost of turf installation at 20% of the respondent's turf install budget but did not prove that finishing the irrigation or turf work would cost anything different than it would have had he paid the respondent to complete the job.

33. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. As the successful respondent paid no tribunal fees, I make no order in this regard. I dismiss the applicant's claim for tribunal fees.

ORDER

34. I dismiss the applicant's claims and this dispute.

Julie K. Gibson, Tribunal Member